IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1935 OF 2006

Balkrishna Sheena Shetty & Anr. .. Petitioners.
Vs.
Janab Mazoonsahed Sayedi
Khazambhai Saheb Qutbuddin & Ors. .. Respondents.

Mr.Y.S.Jahagirdar, senior counsel i/b Mr.P.S.Dani for the petitioners.

Mr.N.V.Walawalkar i/b Mr.M.J.Shetty for respondent no.11.

CORAM : D.B.BHOSALE, J.

DATED : 2ND MARCH, 2007

P.C.:

. Heard learned counsel for the parties.

2. This writ petition under Article 227 of the Constitution of India is directed against the concurrent judgments of the court below by which a suit filed by the respondent-landlords for eviction on the ground of default and sub-letting stands decreed.

3. Mr.Jahagirdar, learned senior counsel for the petitioners - defendant nos.1 and 6 raised only two questions of law, as formulated by the petitioners in the memo of writ petition, bearing ground nos."Q" and "X". The ground nos. "Q" and

"X" read thus:

> "(Q) It is material to note that the cause of action with respect to sub-letting is not cause of action which is covenant running with the premises, but is a covenant which is personal to the landlord. It is material to note that section 13(l)(e) of the Act, which is always subject to the contract to the contrary. The petitioners submit that thus, the said ground of sub-letting can always be given up by the landlord and hence it is his personal right which is not something which is embedded with the premises. Thus, personal right of sub-letting can be continued by the transferee/landlord only if the same is assigned by the transfer or landlord. In this case it is material to note that the suit was already filed by the Trustees on the ground of sub-letting and thereafter the entire premises was purchased by the Plaintiff No.11. However, in the said Agreement there is no reference at all to assignment of this personal cause of action and hence the Plaintiff No.11 could not have proceeded with the said suit and no decree could be passed in his favour on such cause of action.
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> (X) The fact that existence of the original assignment deed dated 21/2/1972 was accepted by teh Plaintiff's witness in his evidence has been completely ignored leading to miscarriage of justice. It is material to note that admission is the best evidence which is available in law and as such admission or existence of the said assignment deed dated 21/2/1972 made by the Plaintiff's witness was best piece of evidence for proving said fact, which has been completely glossed-over by the learned courts below leading to miscarriage of justice."

4. Mr.Jahagirdar did not raise any other contention. His submissions were based upon a deed of assignment of 1972 which was executed by defendant nos.1 to 5, the original tenants, in favour of Mr. and Mrs.Bhatt. By this document

defendant nos.1 to 5 assigned their running business to Bhatts, who according to the petitioner - defendant no.6, were put into possession of the suit premises prior to cut off date, that is, 1.2.1973 and hence were protected tenants. Mr.Jahagirdar submitted Bhatts being protected tenants, had every right to assign running business of the petitioner no.1 - firm to petitioner-defendant no.6.

5. In order to seek protection, the petitioners ought to have established on the basis of the evidence, oral as well as documentary, that Mr.and Mrs.Bhatt were inducted in the premises prior to the cut off date by virtue of the alleged deed of assignment executed on 21.2.1972. In order to establish Bhatt's existence in the suit premises in 1972, Mr.Jahagirdar invited my attention to the plaint, evidence of P.W.1 and few documents, namely, Exhibits-6, 6A, 7A, 8A and 9A as also the observations made by the appeal court in paragraphs 10 and 11 of the judgment. On the basis of the aforesaid material, he submitted, that the deed of assignment dated 21.2.1972 and existence of Bhatts in the suit premises was in fact admitted by the respondent-landlord and that being so the further assignment by Bhatts in favour of the petitioner - defendant no.6 was perfectly legal and valid and

stands protected under the provisions of the Bombay Rent, Hotel, Lodging and Rates Control Act, 1947 (for short "Rent Act"). A perusal of paragraph 8 of the examination in chief of P.W.1, to which my attention was drawn in support of this submission, does not make any reference to Bhatt's though the witness made reference to xerox copy of the deed of assignment dated 21.2.1972 which according to this witness was furnished to the landlords. Despite this statement in the examination-in-chief neither the witness was called upon by the petitioners to produce the said document nor was he cross examined to establish that the document was the very same deed of assignment between Bhatt's and defendant nos.1 to 5. Neither the evidence of this witness nor the evidence of the only witness examined by the tenant, namely, Ashok Bhandari (D.W.1) show that such document was in existence between Bhatt and defendant nos.1 to 5, the original tenants. In other words, the admission by P.W.1 in respect of the deed of assignment dated 21.2.1972, in my opinion, does not connect Mr. and Mrs.Bhatt with the suit premises. D.W.1 in paragraph 24 of his evidence did make reference to the documents - Exhibit-6A to 9A, that is, the Assessment order, Electricity bills, licence under Bombay Shop and Establishment etc. These documents are also not

sufficient to establish existence of Bhatt's in the suit premises on or before the cut off date. All these documents are of the year 1979 or of the subsequent years. The petitioners did not examine Bhatt in support of their claim. The appeal court has appreciated all these facts and circumstances in proper perspective and making specific reference thereto in paragraphs 10, 11 and 12 of the impugned judgment has rightly held that the deed of assignment dated 21.2.1972, of which neither the original nor its xerox copy was produced or the witness was called upon to produced, has not been proved by the petitioner - tenants. I find no reasons to interfere with the concurrent findings of fact in the instant writ petition under Article 227 of the Constitution of India. The petitioners, in my opinion, have failed to establish that there was a deed of assignment dated 21.2.1972 under which Mr. and Mrs.Bhatt were shown as assignors in the second deed of assignment dated 11.4.1979 by which the petitioners claim right, title and interest in the suit premises and the running business therein. In the circumstances, mere existence of the deed of assignment, as admitted by the plaintiff's witness, is not sufficient to hold that there was valid and legal document between Bhatts and defendant nos.1 to 5.

6. The next submission of Mr.Jahagirdar, learned senior counsel for the petitioners, also deserves to be rejected. Even if it is assumed that a ground available under section 13(1)(e) of the Rent Act, that is, to recover possession of the premises on the ground of unlawfully sub-letting or assigning is personal to the landlord and not the covenant running with the premises, and, therefore, cannot be continued by the transferee landlord, that would not help the petitioners in view of the finding that the socalled deed of assignment of 1972 in favour of Bhatt itself has not been proved by the petitioners. The judgment of this court, relied upon by Mr.Jahagirdar, in **Champabai Vs. Anandrao 1993 Mah. Law Journal 370** holding that right to recover arrears of rent is personal to the landlord and the suit by transferee landlord against a tenant on that ground is not maintainable is of no avail to the petitioner. In my opinion, right to seek possession on the ground of arrears of rent and the ground of sub-letting cannot be equated. Under section 15 of the Rent Act, it is not lawful, after the coming into operation of the Rent Act, for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein. Looking to the

language of section 13(1)(e) and section 15 it cannot be said that the cause of action with respect to sub-letting is not cause of action which is covenant running with the premises, but is a covenant which is personal to the landlord. Moreover, in the present case the suit was pending when the premises was transferred and the transferee landlord was arraigned as a plaintiffs. In the circumstances considering that there are concurrent findings recorded by the courts below and as I find sufficient material on record to sustain those findings and considering extremely limited jurisdiction of this Court under Article 227 of the Constitution of India this writ petition fails and dismissed as such.

7. At this stage Mr.Jahagirdar, learned senior counsel for the petitioners prayed for stay of this order to enable the petitioners to carry the matter further. On instructions, he submitted that if sufficient time to vacate is granted, without curtailing the petitioners' right to challenge this order in the Supreme Court, the petitioners are prepared to file an usual undertaking in this court. Mr.Walawalkar, learned senior counsel for the respondent-landlord did not seriously opposed the prayer and left it to the court. Having considered

the submissions of the learned senior counsel for the parties I pass the following order:

. The petitioners are granted six months time to vacate the suit premises subject to their filing the usual undertaking in this court within a period of four weeks form today with an advance copy thereof to the learned advocate on record for the respondent-landlord. Petitioner No.1 is allowed to file undertaking for himself and on behalf of petitioner no.2. He shall also state in the undertaking that Ashok Bhandari runs the business in the suit premises on his behalf and Bhandari has no independent right in the suit premises. Granting of the time to vacate the suit premises and filing of the undertaking shall not curtail the right of the petitioners to challenge this order in the Supreme Court. If the petitioners fail to file the undertaking, as aforestated, it will be open for the respondent-landlord to execute the decree. The writ petition is disposed of accordingly.

(D.B.Bhosale, J.)